

DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

FELIX AGUNYEGO
Respondent

Case No.: C-01-80053

FINAL ORDER

I. Introduction

Respondent Felix Agunyego is a Certified Nursing Assistant/Nurse Aide¹ (“CNA”) who was employed at the Carroll Manor Nursing and Rehabilitation Center (“Carroll Manor”) located in the District of Columbia from July 6, 1998 to January 5, 2001. The Government alleges that Mr. Agunyego repeatedly slapped the face of an elderly resident (“Resident”) of Carroll Manor several times, yelled at the Resident and roughly placed her on her bed on December 16, 2000 sometime between 1:30 PM and 2:00 PM. Mr. Agunyego does not deny that the Resident may have been abused, but asserts that he was not a party to any such abuse, and that he had no interaction with the Resident on the afternoon of December 16, 2000.

¹ The parties have not disputed that Mr. Agunyego meets the definition of “nurse aide” for purposes of the provisions of 29 DCMR Chapter 32. *See* 29 DCMR 3299.1.

After an investigation of the alleged abuse, the Government served Mr. Agunyego with a Notice of Proposed Action, which he received on March 19, 2001, advising him of its intent to list him in the Abuse Section of the Nurse Aide Registry in accordance with 29 DCMR §§ 3251 and 3252.² Pursuant to 29 DCMR §§ 3252.6 and 3253.1, the notice informed Mr. Agunyego of his right to challenge the proposed listing by requesting a hearing before this administrative court within twenty (20) calendar days of his receipt of the notice, in this case, on or before April 8, 2001.³

Mr. Agunyego's request for a hearing was filed with this administrative court on April 20, 2001. Pursuant to the timing requirements for such matters as set forth in 29 DCMR 3253.2 (hearing to be held within ten (10) calendar days of receipt of request), this administrative court issued an order setting a hearing date of April 27, 2001. On April 24, 2001, the Government moved without Mr. Agunyego's opposition to continue the hearing until May 10, 2001. This administrative court granted the motion in part and denied it in part, ordering the parties to appear as scheduled for a pre-hearing conference at which time the parties would, *inter alia*, set a new hearing date.

² See Petitioner's Exhibit 101 ("PX-101"). In accordance with Federal Medicaid regulations, participating States (including the District of Columbia) are required to maintain a nurse aide registry that includes information on any findings of abuse, neglect or misappropriation of funds by a nurse aide. See 42 C.F.R. §§ 400.203, 483.156; see also *Molden v. Mississippi State Dept. of Health*, 730 So.2d 29 (Miss. 1998) (upholding constitutionality of federal mandate for States to adopt Nurse Aide Registry requirements).

³ The regulations originally granted authority over the Nurse Aide Registry to the Department of Consumer and Regulatory Affairs. That authority has been transferred to the Department of Health, and this administrative court has jurisdiction over this case pursuant to Reorganization Plan No. 4 of 1996, Mayor's Order No. 97-42, Mayor's Order No. 99-68 and Department of Health Organization Order No. 99-24.

A. Timeliness of Mr. Agunyego's Request For Hearing

At the pre-hearing conference, the Government raised a timeliness issue as to Mr. Agunyego's request for a hearing pursuant to 29 DCMR 3253.1. The Government contended that because Mr. Agunyego did not provide this administrative court with a hearing request within twenty (20) days of his March 19, 2001 receipt of the Notice of Proposed Action as required by 29 DCMR 3253.1, this matter should be dismissed.⁴ Mr. Agunyego responded that his hearing request was timely as provided to the Department of Health's Program Manager for the Health Care Facilities Division, but, due to his attorney's inadvertence, may not have been timely as provided to this administrative court.

In its order of April 30, 2001, this administrative court permitted the parties to file memoranda of law by May 9, 2001 addressing the nature of the timing requirement set forth in 29 DCMR 3253.1, and whether the hearing request was jurisdictionally defective.⁵ Mr. Agunyego supplied a one-page memorandum citing no legal authorities, and arguing that the

⁴ 29 DCMR 3253.1 provides: "The nurse aide shall request a hearing no later than twenty (20) calendar days from the date of service of the notice." Mr. Agunyego asserts that he provided timely notice of his request for a hearing to the Department of Health's ("DOH") Program Manager for the Health Care Facilities Division on April 6, 2001, which was within the timing requirements set forth in 29 DCMR 3253.1. The Request for Hearing Form provided to Mr. Agunyego, however, specifically instructed that a copy of the request be provided to DOH's Office of Adjudication and Hearings as well as the Program Manager for the Health Care Facilities Division. The Office of Adjudication and Hearings did not receive the request until April 20, 2001, well after the time period prescribed by 29 DCMR 3253.1. These facts are not in dispute.

⁵ Specifically, the April 30 Order invited the parties to address whether the timing requirement is procedural or jurisdictional. If procedural, the timing requirement may be waived either by consent of the parties or, for good cause shown, by this administrative court. If jurisdictional, the timing requirement cannot be waived, although it may be subject to equitable tolling principles under certain extraordinary circumstances. *See, e.g., Customers Parking, Inc. v. District of Columbia*, 562 A.2d 651, 653-54 (D.C. 1989); *Smith v. Dalton*, 971 F. Supp. 1, 6 (D.D.C. 1997).

hearing request provided to DOH's Program Director should constitute "actual and/or constructed [sic]" notice to this administrative court for purposes of satisfying the timing requirement of 29 DCMR 3253.1. The Government elected not to brief the issue. In addition, the April 30 Order required the parties to submit a Joint Proposed Prehearing Order identifying all witnesses, documentary evidence and objections to such evidence to be introduced or raised at the hearing, and set a hearing date of May 11, 2001.⁶

At the start of the May 11, 2001 hearing, this administrative court questioned the parties as to the jurisdictional propriety of proceeding with this case. At that time, the Government withdrew its objection regarding the timeliness of Mr. Agunyego's hearing request, seeking instead to proceed with the case on the merits. While the issue appears to be one of first impression, this administrative court determined by reviewing analogous case law within the District of Columbia and around the country that the timing requirement set forth in 29 DCMR 3253.1 would likely be deemed jurisdictional. *See, e.g., Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944, 945-46 (D.C. 1999) (noting "time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters"); *Fieldston Lodge Nursing Home v. DeBuono*, 690 N.Y.S.2d 606, 607 (N.Y. Sup. Ct. App. Div. 1999) (noting untimely administrative hearing request deprives hearing officer of jurisdiction to review any challenge to discontinuance of Medicaid benefits); *Epperson v. Willis Corroon*

⁶ This administrative court received the parties' Joint Proposed Prehearing Order on May 9, 2001 and endorsed it on May 10, 2001. The parties were required to state in the Joint Proposed Prehearing Order any and all objection to the evidence to be proffered at the hearing as outlined in the Joint Proposed Prehearing Order. Objections not so stated would be deemed waived. At the start of the hearing, counsel for Mr. Agunyego raised various evidentiary objections to the witnesses' qualifications and the documentary evidence, the majority of which could have been raised in the Joint Proposed Prehearing Order but were not. Accordingly, those objections were overruled.

Administrative Services Corp., 934 P.2d 1034, 1036 (Mont. 1997) (noting untimely administrative hearing request regarding worker's compensation determination "must be dismissed"). This administrative court also determined, however, that it did not need to decide the issue in this case, because Mr. Agunyego's hearing request of April 6 satisfied the somewhat vague notice requirements of 29 DCMR 3253.1.⁷ *Cf. Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944, 945-46 (D.C. 1999). Accordingly, this administrative court determined that its exercise of jurisdiction over this matter was proper, and that a hearing on the merits should proceed.

⁷ Although no recipient of the hearing request is specified in 29 DCMR 3253.1, when it is read *in pari materia* with the companion provisions of 29 DCMR 3252 and 3253, the recipient clearly should be the Department of Consumer and Regulatory Affairs ("DCRA"). *See, e.g., Holt v. United States*, 565 A.2d 970, 975 (D.C. 1989) (discussing use of the *in pari materia* approach as a tool in statutory construction). As discussed in note 3 of this Order, DCRA's authority in this regard has been transferred to DOH by government reorganization and delegated to this administrative court. In turn, because 29 DCMR 3253.1 now requires notice to DOH, and this administrative court is an autonomous office within DOH, Mr. Agunyego's hearing request of April 6, 2001 to DOH's Program Manager for the Health Care Facilities Division satisfied that regulatory requirement.

While Mr. Agunyego's hearing request has been found to comply with the notice requirements of 29 DCMR 3253.1 under these unique facts, the implication of Mr. Agunyego's assertion -- that notice to any of the more than 1,200 employees and dozens of organizational components within DOH serves as constructive notice to this administrative court -- is expressly rejected. *See* Mayor's Order No. 99-68; Department of Health Organization Order No. 99-24. Leaving aside the aforementioned issues of regulatory interpretation, a failure to serve this administrative court in violation of an express policy and practice dictate as occurred here, will, absent good cause, ordinarily result in a dismissal. *See* SCR-Civil 41(b) (dismissal for failure to comply with court rules); *Ramos v. District of Columbia Department of Consumer and Regulatory Affairs*, 601 A.2d 1069, 1073-74 (D.C. 1992) (recognizing inherent authority of administrative tribunals to regulate hearing process). Mr. Agunyego's defect has been excused in this instance only because, in an exercise of its discretion, this administrative court has determined that the prejudice to the administration of justice was limited, and because the Government has withdrawn its objection as to the timeliness of Mr. Agunyego's hearing request, opting instead to proceed with the matter on the merits. *Cf. Gardner v. United States*, 211 F.3d 1305, (D.C. Cir. 2000) (discussing judicial discretion considerations and reversing lower court dismissal of complaint based on attorney's isolated failure to comply with court rule), *cert. denied*, 121 S. Ct. 860 (2001).

B. The May 11, 2001 Hearing

The Government presented several witnesses at the hearing: Mary Sklencar, Nurse Consultant, who testified about her investigation on behalf of the Department of Health of the alleged abuse; Eileen Mulaney, Administrator for Carroll Manor, who testified as to Carroll Manor's internal investigation of the alleged abuse; Valrie Berry, CNA at Carroll Manor, who testified about the general duties of CNAs and her observation of the Resident and Mr. Agunyego on December 16, 2000; Gloria Johnson, Activities Coordinator for Carroll Manor, who testified about the Resident's attendance at the activities at Carroll Manor on December 16; and Gloria Maddox, Laundry Aide at Carroll Manor, who testified that she witnessed the alleged abuse in the Resident's room on December 16, 2000. The Government also introduced several documents (PX 100-107), which this administrative court admitted into evidence. Mr. Agunyego appeared with counsel and testified as to his activities on December 16, 2000 with respect to the Resident and categorically denied abusing the Resident. Mr. Agunyego did not introduce any documentary evidence. The record was closed at the conclusion of the hearing.

Based upon the testimony in the record, my evaluation of the credibility of the witnesses and the documents admitted into evidence, I now make the following findings of fact and conclusions of law in accordance with 29 DCMR 3253.5.

II. Findings of Fact

Mr. Agunyego was hired by Carroll Manor as a CNA on July 6, 1998. PX-102. In general, CNAs are responsible for specific residents of Carroll Manor, and provide those residents with a variety of services including transportation within the facility, and assistance with feeding, clothing, bathing, and toileting as needed. Although CNAs are assigned to, and responsible for, specific residents at Carroll Manor, it is not uncommon for CNAs to assist residents to whom they are not assigned. The primary care responsibility for the resident, however, rests with his or her assigned CNA.

On December 16, 2000, Mr. Agunyego was assigned to the Resident with whom he had worked for approximately two (2) years. The Resident was born on August 31, 1920, and was admitted to Carroll Manor on December 30, 1996. PX-102. The Resident is frail, a partial amputee, non-communicative and “totally dependent for bed mobility, transfers, dressing, eating, toilet use, personal hygiene and bathing.”⁸ PX-102. Mr. Agunyego had the primary responsibility for assisting the Resident with her needs. In general, Mr. Agunyego had a good working relationship with the Resident and her family, even purchasing toiletries for the Resident out of his own pocket on occasion. The Resident’s room is number 227 which is located on the second floor of Carroll Manor, approximately four doors away from the Living Room Area.⁹

⁸ Due to her medical condition, the Resident has been unable to testify in these proceedings. PX-102.

⁹ Throughout the course of these proceedings, the recreation area located on the second floor of Carroll Manor has been alternatively referred to as a day room, a living room, a TV room and a solarium. For the sake of clarity, I will refer to these areas collectively as the “Living Room Area.”

On the morning of December 16, 2000, at approximately 7:00 AM, Mr. Agunyego washed and dressed the Resident, and transported her by wheelchair to the dining room for breakfast. PX-104. After breakfast, the residents are typically transported to the Living Room Area and monitored until lunchtime, which begins at 12:30 PM and ends at approximately 1:30 PM. PX-104. Although Mr. Agunyego did not testify about whether he personally transported the Resident to the Living Room Area after breakfast on December 16, 2000, the testimony of Gloria Johnson, Activities Assistant for the second floor, suggests that the Resident participated in a music activity in the Living Room Area around 11:00 AM.¹⁰ PX-108. Other evidence in the record establishes that the Resident was observed by various Carroll Manor staff in the Living Room Area for most of the morning of December 16, 2000. PX-105. Accordingly, I find that the Resident was primarily in the Living Room Area after breakfast and until lunchtime (approximately 12:30 PM).

After lunch, at approximately 1:00 PM, Dorothy Onyenemezu, an employee at Carroll Manor, transported the Resident from the dining room back to the Living Room Area. PX-105. At approximately 1:30 PM, Ms. Valrie Berry, a CNA from the Sierra Nursing Agency who was assigned to sit one-on-one with another Carroll Manor resident that day, witnessed the Resident in the Living Room Area sitting in a chair. PX-107. At approximately 1:45 PM, Ms. Berry witnessed Mr. Agunyego remove the Resident from the Living Room Area. PX-102; PX-107. Mr. Agunyego usually checks his assigned residents after lunch to determine if they need changing.

¹⁰ Ms. Johnson also testified that she and the Resident had a one-to-one visit in the Living Room Area on December 16, but did not have a specific recollection as to what time that visit took place. PX-108.

There is conflicting evidence in the record, however, as to whether Mr. Agunyego actually changed the Resident after lunch on December 16, 2000. Mr. Agunyego testified that he did not change the Resident after lunch and had no other interaction with her that day. PX-104. Ms. Berry's testimony as well as notes of interviews with her suggest that Mr. Agunyego came to the Living Room Area to change the Resident between 1:30 PM and 1:45 PM, although Ms. Berry does not appear certain of this fact. *Compare* PX-102 ("I think Felix came about 1:30 PM to change [the Resident]") *with* PX-107 ("Felix came to change [the Resident] . . . it was before 2:00 PM"). Statements from other Carroll Manor staff also suggest a lack of specific knowledge on this point. PX-105. I need not decide this issue, however, for purposes of the disposition of this case. I do find, however, that between 1:30 PM and 1:45 PM on December 16, 2000, Mr. Agunyego removed the Resident from the Living Room Area.

At approximately 1:45 PM on December 16, 2000, Ms. Gloria Maddox, a Laundry Aide working at Carroll Manor but employed through a temporary staffing service, witnessed a man transporting the Resident from the Living Room Area into the Resident's room (No. 227). At the time she observed this, Ms. Maddox was exiting the laundry room on the second floor. Approximately five minutes later, Ms. Maddox proceeded to deliver laundry to the Resident's room. Before walking in the Resident's room, Ms. Maddox knocked on the open door of the room and announced her entrance by shouting "Laundry." A man inside the Resident's room responded, "O.K."

Inside the room there was a curtain partially drawn around the Resident's bed. Upon entering the room with the Resident's laundry, Ms. Maddox went around the bed to the opening

of the curtain and saw a man yelling at the Resident. The man yelled words to the effect, "I can't do everything for you -- you have to help yourself sometime!" At the time the man was yelling at the Resident, he looked directly at Ms. Maddox and Ms. Maddox had a clear view of the man's face. Ms. Maddox had seen the man around Carroll Manor previously and knew he had worked there, but she did not know his name. Ms. Maddox then delivered the laundry and left the Resident's room.

After leaving the Resident's room, Ms. Maddox observed she had some additional laundry for the Resident on her laundry cart. Ms. Maddox continued hearing the man yelling at the Resident. Ms. Maddox then went back in the room to deliver the additional laundry, and again announced her entrance by knocking on the door and shouting "Laundry." At this time, Ms. Maddox observed through the partially closed curtain the man slapping the Resident on both sides of her face with open hands, grabbing the Resident by her clothes, lifting her from the chair and placing her on the bed. Ms. Maddox delivered the additional laundry and left the Resident's room. While at her laundry cart outside the Resident's room, Ms. Maddox then observed the same man she had observed in the room taking the Resident out of the room towards the Living Room Area. PX-106.

At approximately 4:00 PM on December 16, 2000, Ms. Maddox reported this incident to her supervisor, Rob Gorski, who advised her that he would call Eileen Mulaney. At that time, Mr. Gorski assisted Ms. Maddox in drafting a statement of what she observed. PX-106 (page 2). Later that evening, Ms. Maddox's eight-year-old daughter assisted her in drafting another statement of what she observed. PX-106 (page 1). Ms. Maddox drafted this second statement

because Mr. Gorski advised her that she should have her own record of what she saw. Ms. Maddox later identified to Carroll Manor management the man she witnessed yelling at the Resident, slapping the Resident and throwing the Resident on the bed at approximately 1:45 PM on December 16, 2000 to be Mr. Agunyego.¹¹ PX-102; PX-105. At the hearing, Ms. Maddox also identified Mr. Agunyego as the man she observed in the Resident's room on December 16, 2000 at approximately 1:45 PM.

While there are certain inconsistencies between the two versions of Ms. Maddox's written statements, when taken together with Ms. Maddox's testimony, I do not find those inconsistencies to be material, and therefore, do not need to resolve them here.¹² Mr. Agunyego contends that Ms. Maddox was mistaken as to the identity of the man she witnessed, and that he did not have "the chance" to assist the Resident after lunch because the Resident attended a Christmas Party at Carroll Manor. PX-104. Mr. Agunyego's contention is in direct conflict with the accounts of Ms. Berry and Ms. Maddox each of whom testified credibly that they saw Mr. Agunyego with the Resident between 1:30 PM and 2:00 PM. Moreover, Carroll Manor records indicate that there was no "Christmas Party" on December 16, 2000, and that the only scheduled afternoon group event for the residents was a church service/social starting at approximately 1:00 PM. PX-103. The sponsors of this church service/social delivered Christmas presents to various

¹¹ Carroll Manor's internal investigation of this matter revealed that on the morning of December 17, 2000, the Resident had no visible signs of trauma, bruising or other discoloration on her face.

¹² For example, in the statement written for her by her daughter, Ms. Maddox refers to the man she witnessed in the Resident's room as "the Dr." PX-106. In an earlier statement written for her by Mr. Gorski, however, Ms. Maddox referred to the man as a "male CNA." PX-106. Ms. Maddox explained during her testimony that she thought the man was a doctor because she had seen him previously assisting the patients in various capacities. Ms. Maddox's apparent confusion as to the job title of the man she observed in the Resident's room does not undermine her credibility as to her physical identification of that man.

residents throughout Carroll Manor. Based on the resident tracking and activity logs maintained by Carroll Manor and the testimony of Ms. Johnson, I find that the Resident did not attend the church service/social on December 16, 2000. PX-102; PX-103; PX-108.

By a preponderance of the evidence in this record, therefore, I do not find Mr. Agunyego's contentions to be credible. I find that on December 16, 2000 at approximately 1:45 PM, Mr. Agunyego yelled at the Resident in her room, repeatedly slapped her in the face, and tossed her on her bed, consistent with the eye-witness testimony of Ms. Maddox.

IV. Conclusions of Law

Pursuant to 29 DCMR 3252.7(d), a nurse aide must be listed in the Abuse Section of the Nurse Aide Registry if, *inter alia*, he or she "knowingly abused or neglected a resident." The regulations define "abuse" as "the infliction of physical or mental harm on a nursing home resident," and "neglect" as a failure "to carry out or perform, or to be remiss in the care for or treatment of a nursing home resident." 29 DCMR 3299.1.

The regulations require that a proposed listing of a nurse aide in the Abuse Section of the Nurse Aide Registry must be upheld "unless the nurse aide requests a hearing and disproves the charges against him or her." 29 DCMR 3252.7(d). I do not construe this provision, however, as an exception "otherwise . . . provided by law" to the requirement under the D.C. Administrative Procedure Act that the "proponent of a rule or order shall have the burden of proof." D.C. Code § 1-1509(b); *see also* 29 DCMR 3253.7 ("If the charges against a nurse aide *are sustained* by

the Administrative Law Judge”) (emphasis supplied). Accordingly, the Government, as the proponent of listing Mr. Agunyego in the Abuse Section of the Registry, bears the burden of proving the charges against him by a preponderance of the evidence. *Accord DOH v. Holmes*, OAH Case No. C-00-80017 (Findings of Fact, Conclusions of Law and Final Order, October 11, 2000).

In this case, the evidence relating to the December 16, 2000 incident is sufficient to satisfy the Government’s burden of proof. By physically assaulting an elderly resident in his care, Mr. Agunyego knowingly inflicted at least physical harm upon a nursing home resident.¹³ Such actions constitute “abuse” within the meaning of 29 DCMR 3299.1.

¹³ There is nothing in the record that supports a finding that Mr. Agunyego did not “knowingly” abuse the Resident for purposes of 29 DCMR 3252.7(d). Ms. Maddox’s testimony supports the inference that Mr. Agunyego’s actions in the Resident’s room were deliberate, and, in the absence of contrary evidence, I so find. *See Campos v. United States*, 617 A.2d 185, 189 (D.C. 1992) (term “knowingly” requires proof that the act in question was deliberate or on purpose, not accidental).

V. Order

Based upon my findings of fact and conclusions of law, it is, this _____ day of _____, 2001:

ORDERED, that the decision of the Department of Health to list Respondent Felix Agunyego in the Abuse Section of the Nurse Aide Registry is **AFFIRMED**; and it is further

ORDERED, that, pursuant to 29 DMCR 3252.11, the Department of Health shall record Respondent's name in the Abuse Section of the Nurse Aide Registry along with the documentation required by that section; and it is further

ORDERED, that, pursuant to 29 DCMR 3252.12, the Department of Health shall circulate a copy of this Order to all nursing home administrators in the District of Columbia; and it is further

ORDERED, that judicial review of this order may be obtained by filing a petition for review with the District of Columbia Court of Appeals in accordance with D.C. Code § 1-1510 and the rules of that Court.

/s/ **6/8/01**

Mark D. Poindexter
Administrative Judge